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IDAHO PUBLIC
UTILITIES COMMISSION

Attorneys for Idaho Power Company

BEFORE THE IDAHO PUBLIC UTILITIES COMMISSION

IN THE MATTER OF THE APPLICATION OF)	CASE NO. IPC-E-03-12
IDAHO POWER COMPANY FOR A)	
CERTIFICATE OF PUBLIC CONVENIENCE)	IDAHO POWER COMPANY
AND NECESSITY FOR THE RATE BASING)	PETITION FOR CLARIFICATION
OF THE BENNETT MOUNTAIN POWER)	OR, IN THE ALTERNATIVE,
PLANT.)	RECONSIDERATION
_____)	

COMES NOW Idaho Power Company ("Idaho Power" or "the Company"),
in accordance with RP 325 and 331 and Idaho Code § 61-626, and hereby requests
that the Commission clarify, or in the alternative, reconsider those parts of Order No.
29410 specified below. Idaho Power's Petition is based on the following:

I.

On September 26, 2003, in accordance with the requirements of Idaho
Code § 61-526, Idaho Power filed an Application for a Certificate of Public Convenience
and Necessity to construct a new generating plant in Mountain Home, Idaho. The
generating plant will named the Bennett Mountain Power Plant.

On January 2, 2004, the Commission issued Order No. 29410 in which it approved Idaho Power's Application for a Certificate of Public Convenience and Necessity for the Bennett Mountain Power Plant. In the ordering paragraphs on page 16 of Order No. 29410, the Commission stated in pertinent part:

IT IS FURTHER ORDERED that in the ordinary course of events Idaho Power **may** recover the reasonable and prudent costs of the Bennett Mountain project. Capital costs in excess of \$44.6 million will be reviewed in a subsequent case after the plant has been constructed. Capital costs (excluding transmission interconnection and legally required equipment charges) in excess of the Commitment Estimate cap of \$54.0 million will not be eligible for inclusion in the Company's rate base. (emphasis added)

. . .

IT IS FURTHER ORDERED that the Company's reasonable and prudent fuel costs for the Bennett Mountain plant **may** be recovered through the PCA mechanism. Idaho Power's risk management policies and fuel procurement strategies will be evaluated when PCA costs are reviewed. (emphasis added)

Idaho Power believes it is necessary to obtain clarification of the Commission's interpretation of the word "may" in the above-referenced ordering paragraphs.

II.

Idaho Power's decision to seek clarification or reconsideration in this case arises out of the misunderstanding that occurred in Case No. IPC-E-01-34 (commonly referred to as the "Irrigation Buy-Back case") as a result of the Commission's use of the word "may" in its original order, Order No. 28699, addressing Idaho Power's ability to recover the direct costs and lost revenue impacts of the Irrigation Buy-Back Program.

In the Irrigation Buy-Back case, Idaho Power interpreted the Commission's use of the term "may" as authorizing Idaho Power to collect lost revenues but leaving to a subsequent proceeding the task of quantifying the precise amount of lost revenues to be collected. In Order No. 28992, the Commission indicated that Idaho Power had misunderstood the Commission's use of the term "may" in Order No. 28699. The Commission stated that the term "may" did not imply any final decision had been made and the Order should have been understood by Idaho Power to mean that the Commission could ultimately refuse to include any costs for lost revenues.¹

Idaho Power's appeal of the lost revenue issue in the Irrigation Buy-Back case is currently pending before the Idaho Supreme Court. Idaho Power has no desire to relitigate the issues in that case. Nevertheless, Idaho Power believes that it would be remiss if it failed to obtain a clear understanding of the Commission's intent expressed in Order No. 29410 *today* rather than two years from now after the Company has spent approximately \$50 million and is seeking recovery of its Bennett Mountain investment and expenses in its revenue requirement. As explained below, neither the Commission's nor Idaho Power's interests would be well served under those circumstances.

¹ The pertinent language from Order No. 28992 is as follows:

In Order No. 28699 we stated, "direct costs and lost revenue impacts of this Program may be treated as a purchased power expense in the Company's Power Cost Adjustment ("PCA") mechanism." Order No. 28699 at p. 12 (emphasis added in original). This Commission finding did not guarantee that Idaho Power was entitled to recovery of alleged reduced/lost revenues that resulted from this Program. Rather, the Commission merely recognized that the issue of recovery of these amounts would be considered. Thus, any amount of reduced revenue for which the Company would later seek recovery had to be properly accounted for and subsequently reviewed by the Commission. (R., Vol. II, p. 196, LL. 15-22).

III.

Idaho Power respectfully submits that its request for clarification (or reconsideration) in this case is not motivated simply by “paranoia” on the part of the Company. It is necessitated by prior proceedings before this Commission and the Idaho Supreme Court. In 1993, in a case specifically involving the issuance of a certificate of public convenience and necessity for a generating plant, the Commission’s decision to provide the Company with reasonable assurance that in the ordinary course of events the Company would be permitted to recover its investment in its revenue requirement was challenged by an intervenor. In Case No. IPC-E-91-4 the Commission issued a Certificate of Public Convenience and Necessity to Idaho Power for the upgrade to the Company’s Twin Falls Hydroelectric generating plant.

The Company’s application for a certificate in the Twin Falls upgrade case followed the identical process that was followed in this case. Idaho Power provided a not-to-exceed commitment estimate and the Commission issued a certificate based on that commitment estimate.

Rosebud Enterprises, a QF developer, intervened in the Commission proceeding, petitioned for reconsideration, and ultimately appealed the Commission’s decision to issue a Certificate of Convenience and Necessity for the Twin Falls plant to the Idaho Supreme Court. In its pleadings and briefs Rosebud argued that the Commission should not provide assurance to Idaho Power that it would ultimately be permitted to recover its investment in Twin Falls. Instead Rosebud argued that Idaho Power’s recovery should be limited to the prices paid to Rosebud for power it intended

to sell Idaho Power from its QF project. The Commission refused to modify its ordering language to limit Idaho Power's cost recovery in the manner requested by Rosebud.

What makes the Twin Falls upgrade case important in the context of this Application is that in deciding Rosebud's appeal of the Commission's Twin Falls orders, the Idaho Supreme Court confirmed that the "may" ordering language in Order No. 25021 in the Twin Falls case, which is substantially similar to the "may" language in the above-cited ordering paragraphs in Order No. 29410, provided Idaho Power with an assurance that, absent some unusual occurrence, Idaho Power would be allowed to recover in its revenue requirement its prudently-incurred investment in the Twin Falls upgrade. In *Rosebud Enterprises v. Idaho Public Utilities Commission*, 128 Idaho 633, 917 P.2d 790 (1993), the Idaho Supreme Court quoted the Commission's ordering language in Twin Falls as follows:

On July 22, 1993, the IPUC issued Order No. 25021 granting Idaho Power the following assurance:

[W]e find that, in the ordinary course of events, the Company may expect its investment in the Twin Falls project to be recognized in its revenue requirement, barring unforeseen circumstances of a kind not characteristic of hydroelectric facilities. The ultimate decision determining the appropriate amount of the Twin Falls investment to include in revenue requirement will, of course, be made during the course of a general rate proceeding or a tracker proceeding initiated for that purpose. *Rosebud*, 128 Idaho 633, at 635.

In its opinion in *Rosebud*, the Idaho Supreme Court confirmed that the Commission's above-quoted ordering language recognized that, barring some unforeseen circumstance, Idaho Power would ultimately be allowed to recover in its revenue requirement its prudently-incurred investment in the Twin Falls upgrade. *Rosebud*, 128

Idaho 633 at 634 and 635. For the convenience of the Commission, a copy of the Court's *Rosebud* opinion is attached.

As a result of the *Rosebud* case, we have an Idaho Supreme Court opinion that confirms that the ordering language in Order No. 29410 provides Idaho Power with the reasonable rate-making assurance it needs to move forward with the Bennett Mountain Power Plant.

However, Idaho Power is seeking clarification of Order No. 29410 because it is concerned that at the time the Company seeks to include the Bennett Mountain Power Plant costs in its revenue requirement, a party, like *Rosebud* in the prior case, could claim that the Commission's more recent interpretation of its "may" language in the Irrigation Buy-Back case constitutes a change in the Commission's position from the position expressed in the Twin Falls case. While Idaho Power does not believe that is the case, the Company is concerned that without clarification, a third party could claim it had new authority by way of the Commission's disposition of the Irrigation Buy-Back case to seek a reversal of the Bennett Mountain certificate of public convenience and necessity and a denial of rate recovery of the Company's investment in the Bennett Mountain Power Plant. Idaho Power understands that the specific facts and issues the Commission addressed in the Irrigation Buy-Back case are different than the facts and issues arising in this case. Nevertheless, it seems prudent for Idaho Power to attempt to eliminate this potential issue now rather than deal with it at a later date.

Idaho Power wants to assure the Commission that by filing this Petition it is not seeking to limit in any way the Commission's ability to regularly pursue its

statutory authority. Idaho Power recognizes that when the Bennett Mountain Power Plant is completed and is used and useful, the Company must file with the Commission to include the Company's investment in the Bennett Mountain Power Plant in its rate base. At that time, the Commission will review the various components that make up the Company's investment and, if the Commission determines that some portion of the cost was incurred unreasonably or imprudently, those expenditures can be excluded from rate base. Idaho Power knows it must be able to demonstrate that it has prudently managed its contract with Mountain View Power and demonstrated that the Bennett Mountain Power Plant complies with the specifications contained in the Asset Purchase Agreement with Mountain View Power presented to the Commission in the Application.

The Company also is cognizant that during the course of construction extraordinary events could occur that would cause both the Company and the Commission to reassess the need for or timing of the Bennett Mountain project. Such an extraordinary event would fall under the "ordinary course of business" language in the ordering paragraphs of Order No. 29410 and would require a determination of a reasonable, cost-effective way to proceed under the changed circumstances.

Idaho Power respectfully suggests that the Commission could provide the necessary clarification of Order No. 29410 in several ways. The Commission could issue a clarifying order simply confirming that it has not changed its position from the position it took in Order No. 25021 issued in the Twin Falls upgrade case as confirmed by the Idaho Supreme Court in the *Rosebud* case. In so doing, the Commission would confirm that it interprets its use of the word "may" in the ordering language in Order No. 29410 to have the same meaning the word "may" had in Order No. 25021 in the Twin

Falls certificate case. Idaho Power believes this would provide the necessary confirmation that the Commission's interpretation of the "may" language in the Irrigation Buy-Back case was based on a different set of facts and issues and was not intended to signal a change in the Commission's interpretation of the "may" language found in the ordering provisions of Order No. 29410 and also found in prior cases in which the Commission used similar "may" language in issuing certificates of public convenience and necessity.

The Commission could also clarify Order No. 29410 by modifying the ordering paragraphs in Order No. 29410 to read as follows:

IT IS FURTHER ORDERED that in the ordinary course of events Idaho Power can expect to recover the reasonable and prudent costs of the Bennett Mountain project. Capital costs in excess of \$44.6 million will be reviewed in a subsequent case after the plant has been constructed. Capital costs (excluding transmission interconnection and legally required equipment charges) in excess of the Commitment Estimate cap of \$54.0 million will not be eligible for inclusion in the Company's rate base. (emphasis added)

. . .

IT IS FURTHER ORDERED that the Company can expect its reasonable and prudent fuel costs for the Bennett Mountain plant will be recovered through the PCA mechanism. Idaho Power's risk management policies and fuel procurement strategies will be evaluated when PCA costs are reviewed. (emphasis added)

Idaho Power believes that a clarification by either of these methods would be sufficient and would be consistent with the long-standing precedents associated with the Commission issuance of numerous certificates of public convenience and necessity and with the Idaho Supreme Court's decision in the *Rosebud* case.

IV.

ALTERNATIVE PETITION FOR RECONSIDERATION

If in the Irrigation Buy-Back case the Commission actually intended to modify its prior position expressed in the *Rosebud* case and does in fact interpret its use of the term “may” in the ordering paragraphs in Order No. 29410 as meaning (as Rosebud argued in the Twin Falls case) that the Commission could, after the completion of the Bennett Mountain Power Plant, change its mind and decide that the decision to add the Bennett Mountain Power Plant was no longer consistent with the public convenience and necessity and deny recovery of the Company’s reasonably incurred capital costs and expenses associated with the Bennett Mountain Plant in rates, Idaho Power respectfully submits that the facts and law previously cited in this Petition support the conclusion that such an interpretation is unreasonable, unlawful, erroneous and not in conformance with the facts of record and/or the applicable law.

V.

CONCLUSION

The Company believes that the evidentiary record in this proceeding is sufficient for the Commission to issue its Order either clarifying Order No. 29410 as requested or, in the alternative, making a determination as to Idaho Power’s Petition for reconsideration. If, however, the Commission believes that additional evidence is required, Idaho Power stands ready to proceed immediately to hearing on this matter. Idaho Power must advise the Commission that it will not be able to issue a full notice to proceed to Mountain View Power until such time as this matter is resolved. An extended period for clarification or reconsideration could impact the availability of the

Bennett Mountain Power Plant to meet projected summer loads in 2005 and could increase the ultimate cost of the plant. For this reason, Idaho Power respectfully requests that the Commission expedite its review of this Petition, including shortening the procedural times for giving notice and the times in which interested persons could submit comments or briefs.

The Company respectfully requests that the Commission clarify Order No. 29410 in the manner requested by Idaho Power or, in the alternative, reconsider Order No. 29410 as provided herein.

Respectfully submitted this 12th day of January, 2004.

A handwritten signature in black ink, appearing to read 'B L Kline', written over a horizontal line.

BARTON L. KLINE
Attorney for Idaho Power Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12th day of January, 2004, I served a true and correct copy of the within and foregoing IDAHO POWER COMPANY PETITION FOR CLARIFICATION OR, IN THE ALTERNATIVE, RECONSIDERATION upon the following named parties by the method indicated below, and addressed to the following:

Donald L. Howell, II	<u> x </u>	Hand Delivered
Deputy Attorney General	_____	U.S. Mail
Idaho Public Utilities Commission	_____	Overnight Mail
P. O. Box 83720	_____	FAX
Boise, Idaho 83720-0074		

Peter J. Richardson	_____	Hand Delivered
Richardson & O'Leary	_____	U.S. Mail
P.O. Box 1849	_____	Overnight Mail
Eagle, Idaho 83616	<u> x </u>	FAX

Eric L. Olsen	_____	Hand Delivered
Racine, Olson, Nye, Budge & Bailey	_____	U.S. Mail
P.O. Box 1391	_____	Overnight Mail
Pocatello, Idaho 83204-1391	<u> x </u>	FAX



BARTON L. KLINE

appeal and that where the objections were not raised in the petition for rehearing, they will not be considered by this court." *Key Transp., Inc. v. Trans Magic Airlines Corp.*, 96 Idaho 110, 112-13, 524 P.2d 1338, 1340-41 (1974). Idaho Code section 61-629 requires that "no new or additional evidence" be introduced in the Supreme Court. Rosebud has requested that it be permitted to switch its fuel source to gas, which is a non-qualifying fuel source. 18 C.F.R. § 292.304(a)(2). Such a switch would make Rosebud ineligible to receive the benefits of PURPA. Rosebud's request to have the rates approved by this Court apply to a project with features different from that proposed to the IPUC is beyond the scope of this Court's review.

V.

CONCLUSION

The decision of the IPUC is affirmed. Rosebud's request that this Court set the rates for an altered facility is denied. The respondents are awarded costs. No attorney fees are allowed.

McDEVITT, C.J., JOHNSON and SILAK, JJ., and REINHARDT, J. Pro Tem., concur.



917 P.2d 790

In the Matter of Application of Idaho Power Company for Authority to Rate-base the Investment Required for Adding Capacity to the Twin Falls Hydroelectric Facility.

ROSEBUD ENTERPRISES,
INCORPORATED, Petitioner-Appellant,

v.

IDAHO PUBLIC UTILITIES COMMIS-
SION and Idaho Power Company,
Respondents.

No. 20910.

Supreme Court of Idaho,
Boise, December 1995 Term.

May 30, 1996.

Developer of qualifying facility (QF) under Public Utility Regulatory Policies Act

(PURPA) appealed Idaho Public Utilities Commission (IPUC) orders granting rate base recovery preapproval assurances for proposed upgrade for utility's hydroelectric plant. The Supreme Court, Schroeder, J., held that orders had become final because project had been completed and included in rate base for determining revenue to utility and, thus, appeal was moot.

Appeal dismissed.

1. Electricity ⇌ 11.3(7)

Idaho Public Utilities Commission (IPUC) orders, granting rate base recovery preapproval assurances for proposed upgrade for utility's hydroelectric plant, had become final because project had been completed and included in rate base for determining revenue to utility and, thus, appeal of orders by developer of qualifying facility (QF) under Public Utility Regulatory Policies Act (PURPA) was moot, where developer did not petition for stay of Commission order and did not post bond. Public Utility Regulatory Policies Act of 1978, § 205 et seq., 16 U.S.C.A. § 824a-1 et seq.; I.C. §§ 61-633 to 61-635.

2. Public Utilities ⇌ 169.1

For party to obtain stay of Idaho Public Utilities Commission (IPUC) order, there must be finding of irreparable damage resulting from probable confiscation. I.C. § 61-633.

3. Action ⇌ 6

Action is "moot" if it presents no justiciable controversy and judicial determination will have no practical effect upon outcome.

See publication Words and Phrases for other judicial constructions and definitions.

Orndorff & Trout, Boise, for appellant.
Owen H. Orndorff argued.

Alan G. Lance, Attorney General; Bradford M. Purdy, Deputy Attorney General

argued, Boise, for Idaho Public Utilities Commission. Bradford M. Purdy argued.

Evans, Keane, Boise, for Idaho Power. Larry Ripley argued.

SCHROEDER, Justice.

This is an appeal from Idaho Public Utilities Commission (IPUC) Orders No. 25160 and 25021. In these orders the IPUC accepted Idaho Power Company's (Idaho Power) offer of an estimated upgrade cost for its Twin Falls hydroelectric plant and permitted the estimate to serve as a cap for the amount Idaho Power may include in its future ratebase. The IPUC also recognized that Idaho Power will be allowed to recover in its revenue requirement its prudently incurred investment in the Twin Falls upgrade. Rosebud Enterprises, Inc. (Rosebud) appeals the orders of the IPUC, asserting that placing the Twin Falls project in Idaho Power's ratebase is unfair to ratepayers because the Company could obtain the same energy from Rosebud at a much lower cost: the avoided cost for Rosebud's proposed facility.

I.

BACKGROUND AND PRIOR PROCEEDINGS

On March 25, 1991, Idaho Power filed an Application with the IPUC seeking ratemaking assurance of Idaho Power's investment in the upgrade of its 9 megawatt (MW) Twin Falls hydroelectric project. The upgrade is estimated to increase the total output of the Twin Falls plant to 52.5 MW. Idaho Power's license for the Twin Falls project, issued by the Federal Energy Regulatory Commission (FERC), expired in 1984. Idaho Power operated under annual renewals until January 18, 1991, when FERC renewed Idaho Power's license for the Twin Falls project for an additional 50 years.

On November 25, 1992, Idaho Power filed a "commitment estimate" with the IPUC. Idaho Power's estimate ranged from \$42,366,000.00 to \$50,839,000.00 plus 20 percent for specified contingencies as a cost ceiling

1. coke: Solid carbonaceous residue obtained from bituminous coal after removal of volatile material by destructive distillation, used as fuel

on the amount of investment it would ultimately seek to include in the ratebase. If the final cost were less than the offered estimate, the actual costs would be used in ratemaking; if the actual cost exceeds the commitment estimate, Idaho Power would absorb the excess and would seek to include only the amount of the commitment estimate. The project has in fact been completed below the cost ceiling, and the costs of the project have now been included in Idaho Power's ratebase.

On March 17, 1993, Rosebud filed a petition to intervene. Rosebud is an independent power developer proposing to construct a 40 MW petroleum coke-fired¹ generating plant near Mountain Home, Idaho, and is a self-certified "Qualifying Facility" (QF) under the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-1, et seq. (PURPA). The IPUC issued Order No. 24820 granting Rosebud's Petition to Intervene, finding that Rosebud had "a direct and substantial interest in Idaho Power's request to obtain ratebase preapproval of a base load generating plant."

Idaho Power argued that the Twin Falls upgrade was "nondeferrable" and that it had to optimize the use of the resource to obtain a renewed license from FERC within a time certain or face the possibility of losing its license and the project to another entity. IPUC Order No. 22299 had expressed the IPUC's support of FERC relicensing:

Because existing hydroelectric plants could be lost to competing companies if FERC relicensing requirements are not aggressively pursued, relicensing alternatives require special consideration. For example, if hydroelectric plant relicensing upgrades are proposed, their costs should be presented both as a function of increased plant output and of total plant output to recognize the potential for losing the entire site . . .

Rosebud maintained that allowing the Twin Falls upgrade to be included in Idaho Power's rates would discriminate against Ro-

and in making steel. *Webster's II New Riverside University Dictionary*, 1988.

sebud's Mountain Home QF project, because Idaho Power is allegedly refusing to purchase the power from that project.² Rosebud also contended that Idaho Power's own calculations showed no need for new resources until the year 2006, and, therefore, the Twin Falls project is unnecessary.

On July 22, 1993, the IPUC issued Order No. 25021 granting Idaho Power the following assurance:

[W]e find that, in the ordinary course of events, the Company may expect its investment in the Twin Falls project to be recognized in its revenue requirement, barring unforeseen circumstances of a kind not characteristic of hydroelectric facilities. The ultimate decision determining the appropriate amount of the Twin Falls investment to include in revenue requirement will, of course, be made during the course of a general rate proceeding or a tracker proceeding initiated for that purpose.

The IPUC recognized the inherent value of hydropower, noting that Idaho Power's ratepayers enjoy some of the lowest rates in the nation and that they "have been fortunate to avoid the economic and environmental consequences associated with a predominantly thermal based electric utility." The IPUC rejected Rosebud's contention that the Twin Falls project must be compared to whatever rates Rosebud ultimately receives from Idaho Power for the Mountain Home project.

Rosebud petitioned the IPUC for reconsideration of Order No. 25021. The IPUC issued Order No. 25160 affirming all aspects of

its ruling, determining that Rosebud failed to prove that the assurance granted to Idaho Power by the IPUC violates PURPA. The IPUC concluded that there is no justification for holding utility constructed and owned projects to rules set for QF contracts. Rosebud did not seek to enjoin or restrain the enforcement of the IPUC Orders pursuant to section 61-633 of the Idaho Code (1994). Rosebud appealed the IPUC Orders to this Court.

II.

APPEAL IS MOOT DUE TO FAILURE TO COMPLY WITH I.C. §§ 61-633 & 61-634

[1] If a party seeks to suspend the operation of an IPUC order, that party must comply with the statutory requirements set forth by the legislature. Idaho Code section 61-633 sets forth the procedure which must be utilized to a stay an IPUC order.³ In determining an applicant's right to an injunction, restraining order or other order suspending or staying the operation of an order, a court must determine if the applicant has proven that there would be "great and irreparable damage" if the stay were not granted. I.C. § 61-633. Idaho Code section 61-634 (1994) states that in case the order or decision of the Commission is stayed or suspended, the order shall not become effective until a suspending bond has been executed and filed with and approved by the Commission, or by the court of review.⁴ In essence, I.C. § 61-

operation of the order or decision of the commission, and if an injunction, restraining order or other order suspends or stays the order of the commission as issued, such order shall contain a specific finding based upon the evidence submitted to the court and identified by reference thereto that great and irreparable damage would result to the petitioner and specifying the nature of the damage.

2. For further background and resolution of the dispute concerning the Mountain Home project see *Rosebud Enter., Inc. v. Idaho Pub. Util. Comm'n, Idaho Power Co., and PacifiCorp*, 128 Idaho 624, 917 P.2d 781 (1996).

3. 61-633. Stay of order—Notice.—No court of this state shall enjoin or restrain the enforcement of any order of the commission or stay the operation thereof, unless the applicant for such writ shall give three (3) days' [sic] notice of said application to all adverse parties and to the commission. On the hearing of such application, the applicant shall present to the court a transcript of the proceedings had before the commission, including the evidence, and such transcript shall be considered by the court in determining the applicant's right to an injunction, restraining order or other order suspending or staying the

4. 61-634. Stay of order—Bond.—In case the order or decision of the commission is stayed or suspended, the order shall not become effective until a suspending bond has been executed and filed with and approved by the commission, or by the court of review, conditioned in manner and form as the suspending bond specified in section 61-637, and the court shall direct that all moneys involved in said proceeding shall be paid into

634 is a bond-posting requirement to effect a stay.

This appeal process is not a stay of the IPUC orders. The Idaho Code section 61-635 reads:

Stay of order on appeal.—The pendency of an appeal shall not of itself stay or suspend the operation of the order of the commission, but during the pendency of such appeal, the Supreme Court may stay or suspend, in whole or in part, the operation of the commission's order.

Since this Court has not issued a stay, and the filing of an appeal does not constitute a stay, Orders No. 25021 and 25160 have not been stayed.

In *Utah Power & Light v. Idaho Pub. Util. Comm'n*, 107 Idaho 47, 685 P.2d 276 (1984), this Court addressed the Public Utility Law:

'[W]e construe the Public Utility Law as follows: When any party, be it utility, ratepayer or the State of Idaho, appeals a rate setting Order of the Idaho Public Utilities Commission to the Supreme Court of Idaho, but does not stay the effectiveness of the Order by posting bond under the terms of the Public Utility Law, then the rates and charges set forth by that Order are final in all respects as service is provided and consumed so long as the Order continues in effect. If the Order is later set aside by the Supreme Court of Idaho, no rates and charges previously collected may be adjusted as a result; . . .'

107 Idaho at 49, 685 P.2d at 278 (quoting IPUC Order No. 13550). The failure to stay an order of the IPUC results in the order being effective until an appeal or a motion for reconsideration is entertained. If the action taken by the IPUC is later altered by the Supreme Court or the IPUC, the alteration is prospective only. In this case Idaho Power has completed the project, and the IPUC has granted the additional revenue requirement, including the cost of the project in Idaho Power's ratebase.

[2] For a party to obtain a stay of an IPUC order, there must be a finding of

court under the terms and conditions and subject to the disposition thereof, provided in sections

"irreparable damage resulting from probable confiscation." *Utah Power & Light*, 107 Idaho at 52, 685 P.2d at 281. This Court rejected *Utah Power & Light's* argument that a stay cannot be considered an exclusive remedy from an IPUC order and explained the statutory provisions of the Public Utility Law by stating, "A common thread weaves through these provisions: rates set by order are final *unless stayed* and are determinative of all rights of the parties as long as they remain in effect without regard to whether they are later altered or amended on rehearing or altered or amended after being set aside on appeal." 107 Idaho at 53, 685 P.2d at 282 (emphasis in original). The same interpretation of the Public Utility Law applies to IPUC orders which grant "assurances" to public utilities for future ratemaking proceedings. The project has been completed and included in the ratebase for determining revenue to Idaho Power. Rosebud did not petition for a stay of the IPUC order, I.C. § 61-633, and did not post a bond, I.C. § 61-634. Rosebud is precluded from challenging the assurances offered by the IPUC to Idaho Power. The orders granting the assurances have become final.

[3] An action is moot if "it presents no justiciable controversy and a judicial determination will have no practical effect upon the outcome." *Idaho County Property Owners Ass'n, Inc. v. Syringa Gen. Hosp.*, 119 Idaho 309, 315, 805 P.2d 1233, 1239 (1991). This appeal is moot.

III.

CONCLUSION

This appeal is dismissed as moot. The respondents are awarded costs. No attorney fees are allowed.

McDEVITT, C.J., JOHNSON and SILAK, JJ., and REINHARDT J. Pro Tem., concur.

